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No. _____

In the
Supreme Court of the United States

COHL, STOKER, TOSKEY & MCGLINCHEY, P.C.,
Petitioner

V.

46th CIRCUIT TRIAL COURT,
Respondent

AND

OTSEGO COUNTY,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where a specially assigned state trial judge—who as chief judge of his own local court may well face the same financing problem as that presented by a plaintiff state trial court—exercises his discretionary authority to sanction a law firm representing the plaintiff court's defendant funding units under debatable circumstances, and is affirmed by a three-judge appellate panel, and on a further appeal an organization representing all the trial judges and all the Court of Appeals judges in that state seeks to participate as *amicus curiae* on the side opposite that of the sanctioned law firm and its clients, the judges' organization utilizing its status as an organization of state judges in a direct effort to influence that State's highest court to favor the plaintiff trial court's position, has the due process right to a fair hearing by a fairly constituted tribunal been so compromised that the sanctioned law firm is entitled to have the issue of sanctions revisited *ab initio* by a truly unbiased and disinterested judge?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is the law firm of Cohl, Stoker, Toskey & McGlinchey, P.C., and Michigan professional corporation. The parties to the state proceedings at issue were petitioner Cohl, Stoker, Toskey & McGlinchey, P.C., the 46th Circuit Trial Court (a respondent herein, an amalgam of the circuit court for the counties of Crawford, Kalkaska, and Otsego, the 87th District Court, the Crawford County Probate Court, the Kalkaska County Probate Court, and the Otsego County Probate Court), and the three counties of Crawford, Kalkaska, and Otsego (with Otsego being the other respondent as to this petition).

There are no other corporations, limited liability companies, partnerships, limited partnerships, or juristic entities that are parties to this case. There are no natural persons party to this case.

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that state seeks to participate as *amicus curiae* on the side opposite that of the sanctioned law firm, utilizing its status as an organization of state judges in an effort to influence that State's highest court, has the due process right to a fair hearing by a fairly constituted tribunal been so compromised that the law firm is entitled to have the issue of sanctions revisited *ab initio* by a truly unbiased and disinterested judge? 11

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The Michigan Supreme Court's orders denying rehearing are officially reported at 477 Mich 1002 (2007) and 477 Mich 1007(2007), and are reproduced at Pet. Apx. 3a-4a and 7a (Appendices B and D).

The Michigan Court of Appeals' decision issued May 3, 2005 is officially reported at 266 Mich. App. 150, 702 N.W.2d 588 (2005), and is reproduced at Pet. Apx. 8a-51a (Appendix E), while that portion of particular importance to this petition appears at Pet. Apx. 36a-40a.

The 46th circuit court's (Michigan) order of May 30, 2003, imposing sanctions on Petitioner in favor of respondents , is reproduced at Pet. Apx. 52a-54a(Appendix F).

The 46th circuit court's (Michigan) opinion of May 30, 2003, imposing sanctions on Petitioner in favor of respondents , is reproduced at Pet. Apx. 55a-91a (Appendix G).

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment entered by the Michigan Court of Appeals on May 3, 2005, in this case, as to which the Michigan Supreme Court has declined discretionary review.

JURISDICTION

The Michigan Supreme Court denied petitioner's timely application for leave to appeal on November 1, 2006, and denied petitioner's timely motion for rehearing on January 29, 2007. The jurisdiction of this Court is based on 28 USC §1257(a) and Rule 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of §1 of the Fourteenth Amendment, Pet. Apx. 306a (Appendix Q), as well as the potential application of 28 U.S.C. §§1443(1) and 1446(b) (Pet. Apx. 346a) (Appendix S).

STATEMENT

INTRODUCTION

Petitioner Cohl, Stoker, Toskey & McGlinchey, P.C., is a law firm, which was retained to represent two Michigan counties, Crawford and Kalkaska, in a lawsuit brought by their local consolidated courts, the 46th Circuit Trial Court ("46th CTC"), an entity representing an administrative consolidation of the 46th circuit court, the 87th district court, and the probate courts of Crawford, Kalkaska, and Otsego Counties[1] originally engendered by Michigan Supreme Court Admin Order 1996-9, 451 Mich. civ (Pet. Apx. 347a-349a) (Appendix T).

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[1] Initially the 83rd District Court, which then included Roscommon and Crawford Counties, was included, but the Michigan Legislature, by enacting Public Act 92 of 2002, revised the boundaries of the 83rd and 87th districts, Mich. Comp. L. §§600.8148 and 600.8152 (Pet. Apx. 349a) (Appendix U), and, insofar as relevant here, the geographic description of the territories and judicial entities included is correct.

Petitioner found itself dealing with a skeptical if not hostile assigned trial judge from another county, Hon. Dennis C. Kolenda, the chief judge of the Kent County circuit court (Michigan), a judge who might himself someday face the same sort of funding dispute with his local legislators. In the course of the litigation, that assigned judge twice took the highly unusual step of *sua sponte* questioning the legal or factual basis of actions taken by Petitioner on behalf of its clients—actions which the opposing parties had not seen fit to challenge—and, having invited respondents to file motions on grounds they had to that time overlooked or not regarded as meriting such action, then proceeded to sanction Petitioner for what that judge perceived as "frivolous" pleadings in violation of Michigan Court Rule 2.114(E) (Pet. Apx. 361a, Appendix V), a rule functionally identical to FRCivP 11.

On Petitioner's appeal of right of those sanctions rulings to the Michigan Court of Appeals, the penalties were affirmed as neither "clearly erroneous" nor "an abuse of discretion". 266 Mich. App. at 180-181 (Pet. Apx. 36a-40a) (Appendix E).

Subsequently, while various issues were still pending on remand to the assigned trial judge and to the Michigan Court of Appeals, quasi-official judicial organizations representing "all the trial judges" and "all the Court of Appeals judges" in Michigan (Pet. Apx. 93a) filed a motion to participate as *amici curiae* on the side of the 46th CTC (Appendix H). That belated revelation of actual bias in favor of the opposing party by a group including every one of the judges who actually ruled on the merits of the sanctions issues demonstrated that the 14th Amendment's guarantee of a fair hearing before a fair tribunal had been violated, and prompted Petitioner to file this petition for certiorari.

FACTUAL AND PROCEDURAL BACKGROUND

The 46th Circuit Trial Court ("46th CTC"), led by its then chief judge, Alton T. Davis (a member of the Michigan Court of Appeals since July 19, 2005, see 267 Mich App ix-x (2005)), claimed a right to additional funding of its operations on the basis of "inherent powers"[2] and contract. The contract claim was in part centrally predicated on an August 29, 2000 resolution passed by the Crawford County Board of Commissioners concerning retiree health care for employees of the 46th CTC. That resolution was the product of certain representations made by Rudi Edel, administrator of the 46th CTC, to the Crawford County Comptroller, Paul Compo, and the Crawford County Board of Commissioners as to the present cost of the benefit sought and the anticipated annual premium increase (4%) through the year 2017. Crawford's resolution was expressly linked to Edel's cost figures; however, the 46th CTC's complaint sought to compel Crawford to honor the contract according to the "true" cost figures, which were about 25% higher to start, with a much higher annual increase.

In defense of the contract claim, Petitioner obtained affidavits from each of the seven Crawford County commissioners, in which they all attested that, on August 29, 2000, they did not know, for a fact, that the cost figures supplied by Rudi Edel were incorrect and unreliable. Petitioner also obtained a copy of a memorandum, written by Rudi Edel on August 28, 2000 and addressed to his superiors, acknowledging that the true cost figure for retiree health care was 25% higher than the figure he provided to the Crawford County Board of Commissioners the very next day, that the expected annual increase was much greater

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[2] See *Wayne Circuit Judges v. Wayne Co (On Rehearing)*, 386 Mich. 1, 8-9, 190 N.W.2d 228 (1971) for a primer on Michigan's version of the "inherent powers" doctrine.

than 4%, and that to obtain approval of the plan it would be necessary to conceal these facts from Crawford County.

Petitioner, as counsel to Crawford and Kalkaska counties, accordingly answered the Complaint on behalf of Crawford and Kalkaska by interposing an affirmative defense of "innocent misrepresentation" under Michigan law.

Subsequently, a letter from the Crawford County Comptroller addressed to Peter Cohl, one of the principals of Cohl, Stoker, Toskey & McGlinchey, P.C., and dated more than a year after the August 29, 2000 meeting, came to light. Therein, the Comptroller—who was not a member of the Crawford County Board and did not vote on the August 29, 2000 resolution, but was present at the meeting—wrote that he thought some members of the Crawford County Board "knew" that Mr. Edel's numbers were incorrect, and that they worded their retiree health care resolution to "call his bluff." (Pet. Apx. 30a).

The lawsuit was assigned to be heard by Hon. Dennis C. Kolenda, chief judge of the Kent County circuit court (Michigan). Under Michigan law, trial judges are accorded broad discretion in sanctioning conduct by attorneys or parties they consider improper. MCR 2.114(E) (Pet. Apx. 361a, Appendix V).

Judge Kolenda *sua sponte* suggested to counsel for respondent 46th Circuit Trial Court that the Comptroller's letter indicated that the "claim" of "fraud" was without arguable basis in fact when raised, that as a matter of law there could have been no reliance[3], and that sanctions should

[3] Yet the Michigan Supreme Court noted that Crawford County's August 29, 2000 resolution approving retiree health care benefits was conditioned on the false cost figures posited by Mr. Edel, and for that reason there had

be imposed on Petitioner under MCR 2.114(E) (derived from FRCivP 11)[4]. Once a motion to that end was then filed by respondent court, Judge Kolenda granted it (Pet. Apx. 88a-89a).

Meanwhile, Otsego County, as "control unit" for the 46th CTC, which had supported the 46th CTC's funding requests, implemented two disputed enhanced benefits for all employees, an enhanced retroactive pension and the retiree health care benefit. This action, if legal, would have caused Crawford and Kalkaska Counties to be liable for additional funding for judicial operations that they had not appropriated, and which they did not have on hand or available as anticipated revenues. Under Michigan law, all municipalities must have balanced budgets; deficit budgets are unlawful. On behalf of Crawford and Kalkaska, therefore, and pursuant to the suggestion of the Michigan Department of Treasury [5] (which had attempted to mediate the dispute), Petitioner filed a third-party complaint for declaratory relief against Otsego on behalf of Crawford and Kalkaska, in which it was indicated that Otsego's action would cause Crawford and Kalkaska to violate the Michigan

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never been a "meeting of the minds" sufficient to give rise to any possible contract (Pet. Apx. 144a-146a, Appendix I) (see footnote 4 below).

[4] Although the Michigan Supreme Court never directly addressed the "fraud" claim, it did acknowledge that Mr. Edel's information was "in error", *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 137 (2006) (Pet. Apx. 101a-102a) (Appendix I), and held, contrary to Judge Kolenda's "finding", that Crawford County clearly relied on Edel's cost figures in its approving resolution, which meant that there was never a "meeting of the minds" to support any contract, 476 Mich at 158-159, Pet. Apx. 139a) (Appendix I).

[5] The Michigan State Treasurer's office attempted to mediate the dispute, and prepared a detailed analysis (Pet. Apx. 134a-144a, (Appendix J)) noting both that the 46th CTC's appropriations and cost figures were inconsistent with the Treasurer's audit (Pet. Apx. 138a), and that Otsego's unilateral action would cause Crawford and Kalkaska to violate the UBAA (Pet. Apx. 143a-144a).

Uniform Budgeting and Accounting Act (UBAA), Mich. Comp. L. §§141.421 *et seq.* (Pet. Apx. 352a-356a, Appendix W) by not having balanced budgets, and seeking a declaration that Crawford and Kalkaska were not obligated to make additional appropriations.

Again acting *sua sponte*, Judge Kolenda suggested to respondent Otsego County's attorney that petitioner's standing should be challenged (even though such an issue had been waived by not being raised in the county's first responsive pleading, pursuant to Michigan Court Rule 2.116(C)(5) and (D)(2) (Pet. Apx. 351a, Appendix V). Once Otsego County accepted that invitation and filed its motion, Judge Kolenda sanctioned Petitioner on grounds that neither Crawford nor Kalkaska had standing to assert a claim under the UBAA (Pet. Apx. 89a-90a, Appendix G); under the statute, only a prosecutor or the attorney general has standing to prosecute a violation of the statute and demand repayment of funds to the country treasury. Mich. Comp. L. §141.440 (Pet. Apx. 356a)[6]. Petitioner was ordered to pay Otsego's entire attorney fees and other costs, even though the UBAA was only mentioned in one of more than 100 paragraphs of the Complaint.

Altogether, sanctions in excess of $200,000 were imposed on Petitioner by Judge Kolenda[7].

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[6] Moreover, because neither Crawford nor Kalkaska had appropriated or paid any additional funds, there was nothing to recoup, and the action was declaratory in form, making the statutory restriction on suing for reimbursement irrelevant. Under accepted standing norms, Crawford and Kalkaska surely had standing to seek judicial construction of a governing statute in order to avoid a possible violation the law. *Massachusetts v. EPA*, ___ U.S. ___ ; 127 S. Ct. 1438, 1453 (2007); accord: *Associated Builders & Contractors v. Director, DCIS*, 472 Mich. 117, 127-128 (2005).

[7] Under Michigan practice, although a stay pending appeal was granted, the stay expired when the Michigan Supreme Court first denied leave to appeal. Mich. Ct. Rule 7.215(F)(1). Further, under Michigan practice a

Judge Kolenda proceeded to try the remaining issues, and he ruled in favor of the 46th CTC in all respects on each of its claims. On appeals of right, with Petitioner joined by undersigned counsel representing Crawford and Kalkaska Counties, and undersigned counsel representing Petitioner in its appeals of sanctions, Judge Kolenda's rulings were affirmed *in toto* by the Michigan Court of Appeals (Pet. Apx. 36a-40a, 49a, Appendix E) as not constituting an abuse of the trial court's discretion.

On further appeal to the Michigan Supreme Court, leave was granted as to the "inherent powers" and contract claims, with all other issues ordered held in abeyance. On leave granted, the Michigan Supreme Court reversed the lower courts, holding that there was "no evidence" to support an "inherent powers" claim (Pet. Apx. 119a,, 147a) and likewise neither a "meeting of the minds" nor consideration as a matter of law to support a contract claim (Pet. Apx. 144a-146a) (Appendix I).

After that ruling, however, the Michigan Supreme Court remanded other issues (concerning the 46th CTC's claim for attorney fees, and regarding apportionment of those fees among the three counties) to the Court of Appeals for reconsideration (Pet. Apx. 145a-148a) (Appendix K), but it denied leave as to the sanctions imposed on Petitioner (Pet. Apx. 1a-2a and 5a-6a) (Appendices A and C). Petitioner then timely moved for reconsideration.

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stay pending this petition for certiorari would not be granted. *Grievance Admin'r v. Fieger*, 477 Mich. 1228 (2007). Petitioner accordingly has fully paid the sanctions imposed, but has an absolute statutory (as well as common-law) right to recoupment if the judgments against it are set aside, vacated, or reversed for any reason. Mich. Comp. L. §600.1475. Therefore, this petition is not moot.

While the motions for reconsideration as to sanctions were pending, the Michigan Court of Appeals on December 21, 2006 issued a decision on remand regarding the 46th CTC's right to attorney fees. *46th Circuit Trial Court v. Crawford Co (On Remand)*, 273 Mich. App. 342 (2006). On behalf of Crawford and Kalkaska Counties, Petitioner and undersigned counsel filed an application for leave to appeal with the Michigan Supreme Court, challenging that ruling, which became Michigan Supreme Court Docket Nos. 132986-132988.

On January 29, 2006, the Michigan Supreme Court denied Petitioner's motions for reconsideration as to sanctions (Pet. Apx. 3a and 7a). On February 13, 2006, the Michigan Judges Association (MJA), Michigan Probate Judges Association (MPJA), and Michigan District Judges Association (MDJA) moved for permission to appear as *amici curiae* in opposition to Crawford and Kalkaska Counties' application for leave to appeal (Pet. Apx. 91a-95a) (Appendix H) in Michigan Supreme Court Nos. 132986-8. That motion and the proffered brief that accompanied it were signed by attorney Hilda R. Gage, who had been a judge of the Michigan Court of Appeals until her retirement effective January 15, 2006.

In their motion for leave to appear as *amici*, the Associations stated that the Michigan Judges Association (MJA) is an organization representing "all the trial judges and all the Court of Appeals judges" in Michigan (Pet. Apx. 92a). It eventuates that the 46th CTC's original chief judge, Alton T. Davis (who was appointed to the Michigan Court of Appeals on July 19, 2005[8], see 267 Mich App x), was successively Secretary, Vice-President and President of the

[8] The Michigan Court of Appeals decided the sanctions issues prior to the time Judge Davis became a member of that Court, but while Judge Gage was serving on the Court.

Michigan Judges Association (Pet. Apx. 150a, 152a, 153a) (Appendix L), and that Judge Kolenda is currently a member of the Rules Committee of the MJA (Pet. Apx. 180a) (Appendix N).

REASONS FOR GRANTING THE PETITION

This Court has, infrequently but with some regularity, been called upon to protect the fundamental 14th Amendment right of persons in State proceedings to due process, being a "fair hearing before a fair tribunal". *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (also a Michigan case); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) ("due process requires a 'neutral and detached judge in the first instance' ") This Court has performed its bedrock function as the Court of last resort in striking down State judgments that reflected participation by judges, trial and appellate, who had incentives to be less than impartial. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Monroeville*, 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). This Court has underlined essential constitutional guarantee of fundamental fairness "may not be eroded" either by the States or the federal government. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

Here, Petitioner has been subjected to discretionary sanctions suggested *sua sponte* with debatable justification[9]

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[9] Petitioner recognizes that the substantive propriety of the sanctions imposed is a question of Michigan law over which this Court has no jurisdiction. *Arizona v San Carlos Apache Tribe*, 463 U.S. 545, 561, 103 S. Ct.. 3201, 3210, 77 L. Ed. 2d 837 (1983). But this Court can at least take note that compelling arguments against those sanctions were made by Petitioner in the Michigan courts (Pet. Apx. 164a-234a and 235a-305a) (Appendices O and P), and that fair-minded, impartial judges who

by a Michigan circuit judge who not only had incentive to favor the opposition (fellow judges) because he might some day have a dispute with his own county over funding issues, but who, through an organization, now seeks to take sides in the dispute, and to side with Petitioner's opposition. Judge Kolenda's exercise of discretion has been upheld by Michigan Court of Appeals judges who also are members of the same organization of judges that seeks to take sides in the dispute, and to side with Petitioner's opposition. This blatant disregard of the veil of judicial impartiality came to light only after the Michigan Supreme Court had denied Petitioner's motion for reconsideration as to sanctions (thus leaving Petitioner no further avenue under Michigan procedure for redress of the constitutional issue), but it reflects preexisting biases.

Issue I: Where a specially assigned state trial judge—who as chief judge of his own local court may well face the same problem as that presented by a plaintiff state trial court—exercises his discretionary authority to sanction a law firm under debatable circumstances, and is affirmed by a three-judge appellate panel, and subsequently an organization representing all the trial judges and all the Court of Appeals judges in that state seeks to participate as *amicus curiae* on the side opposite that of the sanctioned law firm, utilizing its status as an organization of state judges in an effort to influence that State's highest court, has the due process right to a fair hearing by a fairly constituted tribunal been so compromised that the law

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approached the issue in a detached and neutral fashion might well have reached a different conclusion. Thus, although the propriety of the substantive ruling based on Michigan law is not before this Court, the validity of the process of making that state law determination by judges whose bias has been belatedly revealed is properly here for consideration based on the 14th Amendment. *Ohio v Reiner*, 532 U.S. 17, 20, 121 S. Ct. 1252, 149 L. Ed. 2d 158 (2001) and cases there cited.

firm is entitled to have the issue of sanctions revisited *ab initio* by a truly unbiased and disinterested judge?

ISSUE PRESERVATION

Michigan applies the common-law "rule of necessity", *Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N.W. 317 (1907); *Champion's Auto Ferry, Inc. v Michigan Public Service Comm'n.*, 215 Mich. App. 699, 709-710; 588 N.W.2d 153 (1998) which this Court has similarly recognized. *United States v. Will*, 449 U.S. 200, 212-213, 101 S. Ct. 471, 66 L. Ed. 2d. 392 (1980). Under that rule, when all judges are equally disqualified, none is so disqualified, in order to avoid a situation in which the case otherwise cannot be heard at all.

But this is not such a case. The Michigan Constitution provides for the *ad hoc* assignment by the Michigan Supreme Court of "persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments". Mich. Const. 1963, art. 6, §23 (Pet. Apx. 357a, Appendix X). The Michigan Legislature has authorized the Michigan Supreme Court to assign retired judges "to perform judicial duties in any court in the state." Mich. Comp. L. §600.226(1) (Pet. Apx. 358a, Appendix Y). Of crucial importance, retired or other former elected judges are not, at least by the definitions of the three Michigan judges associations, necessarily current members of those groups (although all—with the possible exception of former Michigan Supreme Court justices who did not serve in a judicial capacity in a lower court—are no doubt former members).

Petitioner, on its own behalf and for its clients, did argue on appeal that Judge Kolenda, as an active circuit judge who might well some day find himself involved in a similar dispute with his own county board of commissioners over funding issues, especially in his role as chief judge, was not

"disinterested" as required by a Michigan Supreme Court administrative order that governs "inherent powers" lawsuits filed by Michigan trial courts. See 266 Mich App at 181 (Pet. Apx. 40a). Michigan law also provides that a judge is disqualified only on the basis of "actual bias", *Cain v Dep't of Corrections*, 451 Mich. 470, 495; 548 N.W.2d 210 (1996), and the burden of proving the existence of such actual bias is on the litigant challenging a judge's impartiality. *Id.*, 451 Mich. at 497. In that regard, rulings made during the course of a lawsuit are held not to constitute proof of actual bias except under extraordinary circumstances. *Id.*, 451 Mich at 496, quoting *Liteky v. United States*, 510 U.S. 540, 550, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

Thus, prerequisite evidence of actual bias became apparent and available to Petitioner only when the three associations of Michigan judges filed their motion to participate as *amici curiae*, after the Michigan Supreme Court had declined on reconsideration to grant discretionary review of the sanctions imposed upon Petitioner. Thus, the issue here presented arose too late to be included in prior proceedings, because the prerequisite conclusive evidence of actual bias was unavailable to petitioner until February 13, 2007.

ANALYSIS

This case presents a question as to the application of US Const, Amendment 14 (Pet. Apx. 306a, which prohibits the states from denying anyone due process of law.

The Michigan Judges Association ("MJA") is an assumed name of Michigan Judges Association, Inc., a non-profit corporation formed in 1983 (Pet. Apx. 155a-159a, Appendix M). The Michigan District Judges Association ("MDJA") and Michigan Probate Judges Association ("MPJA") are not incorporated in Michigan, according to the public records of

the Michigan Department of Labor and Economic Growth, so they appear to be mere voluntary associations. The Michigan Judges Association in particular, although not created by statute, court rule, or administrative order, has been accorded privileged status by virtue of Rule 2 of the Rules Concerning the Judicial Conference of Michigan (Pet. Apx. 359a) (Appendix Z), which makes the President of the MJA a director of the conference. A State Bar of Michigan regulation likewise permits each association to name at least one member to serve on the Standing Committee on Professional and Judicial Ethics.

Article II of the MJA's Articles of Incorporation proclaims its purpose as being "to promote the general welfare of the membership and the administration of justice and to bring the judges into a closer relationship with one another"(Pet. Apx. 155a). Encouraging fraternity and socialization among judges who will be ruling upon claims filed by one another against third parties may be designed to promote the welfare of judges personally, but can hardly be said to further the administration of "justice". A system of justice administered by a group of friends for their mutual benefit and in furtherance of their relationships with one another is a complete contradiction in terms.

As this Court held in *Republican Party of Minnesota v. White*, 536 U.S. 735, 775-776, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002):

> One meaning of "impartiality" in the judicial context--and of course its root meaning--is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the

traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed.1950) (defining "impartial" as "[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just"). It is also the sense in which it is used in the cases cited by respondents and *amici* for the proposition that an impartial judge is essential to due process. *Tumey v. Ohio*, 273 U.S. 510, 523, 531-534, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoïe*, 475 U.S. 813, 822-825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58-62, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) *(per curiam)* (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U.S. 133, 137-139, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

Of course, once Judge Kolenda *sua sponte* resolved to invite motions to impose sanctions on Petitioner, Petitioner became a party, at least to that extent, and the same principles must therefore apply. Any other result would mean that a judge may properly be biased against the lawyers for a party, or alternatively that unconstitutional bias against a party somehow magically evaporates when

the judge turns his attention to that party's attorney(s). Petitioner surely did not receive impartial application of the law to itself the same as it "applies to any other party."

What judges may not do individually, surely they may not do collectively, and vice versa. The effort by the Michigan Judges Association, on behalf of each of its members (including Judge Kolenda and the three Court of Appeals judges who upheld his sanctions rulings against Petitioner), to insert itself (and themselves) directly into the center of litigation, as advocates on the side of the opposing judicial party, reveals the presence of a level of bias, arising from both parochial and personal financial concerns as well as institutional imperatives, that is inconsistent with due process requirements under the 14th Amendment.

As this Court held in *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., supra,* 508 U.S. at 617-618 (emphasis added):

> "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. Ohio,* 273 U.S. 510, 522, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927). **Before one may be deprived of a protected interest,** whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242, and n. 2, 100 S. Ct. 1610, 1613, and n. 2, 64 L. Ed. 2d 182 (1980), **one is entitled as a matter of due process of law to an adjudicator who is not in a situation " 'which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true....' "** *Ward, supra,* 409 U.S. at 60, 93 S. Ct. at 81 (quoting *Tumey, supra,* 273 U.S., at 532, 47 S. Ct., at 444). **Even appeal and a trial *de novo* will not cure a**

failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S. Ct. at 83.

> **"[J]ustice," indeed, "must satisfy the appearance of justice,** and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc., supra,* 446 U.S., at 243, 100 S.Ct., at 1613 (citations and internal quotation marks omitted).

By their own description (Pet. Apx. 93a, motion ¶3), the three judicial associations "represent the interests of all Michigan trial and Court of Appeals judges." Their joint *amici* petition stands as a confession that an organization representing "all [Michigan] Court of Appeals judges" and all Michigan circuit judges, *inter alia,* desires to take a position alongside that of the 46th Circuit Trial Court in the underlying litigation, **at a time when the Michigan Court of Appeals still had pending before it four cases on remand,** see 46th *Circuit Trial Court v. Crawford Co,* 477 Mich. 920 (Case 3), 921, and 922 (2006), and in conjunction with review of the Court of Appeals' first decision on remand pursuant to 46th *Circuit Trial Court v. Crawford Co,* 477 Mich. 920 (Case 2) (2006). Likewise, the Michigan Judges Associations claims to represent "all trial judges", yet certain motions after remand are already pending before Judge Kolenda, and there is a trenchant possibility that additional issues will arise before him.

The belated appearance of the three judicial associations on the side of the 46th CTC undermines the validity and reliability of all prior discretionary (or other) adjudications performed by their members, not the least being the various sanctions imposed on Petitioner in large part *sua sponte* by Judge Kolenda, and upheld by the Michigan Court of

Appeals as being neither "clearly erroneous" nor an "abuse of discretion". Suddenly, there is an explanation for the fact that, during oral argument in the Michigan Court of Appeals in the appeals of right, two of the Michigan Court of Appeals judges literally shouted down counsel for the Crawford, Kalkaska and Petitioner consistently as he strove to answer their questions (Pet. Apx. 309a-344a, Appendix R) contrary to Michigan Code of Judicial Conduct Canon 3A(8) ("A judge should avoid interruptions of counsel in their arguments except to clarify their positions, and should not be tempted to the unnecessary display of learning or a premature judgment." Pet. Apx. 360a, Appendix AA)[10].

A more unseemly and ill-timed intervention as purported *amici* could hardly be imagined. Instead of a remand for reconsideration before panels of appellate judges who are constitutionally obligated to be neutral toward the parties, or to a trial judge required by Michigan Supreme Court Administrative order to be "disinterested", Mich S Ct Admin Order 1998-5 (Pet. Apx. 40a) and equally constitutionally restricted to being fair and impartial, *In re Murchison, supra*, 349 US at 136, Petitioner finds itself sanctioned by a trial judge, and those sanctions upheld by a panel of appellate judges, all of whom now seek to participate in the underlying litigation and to take the side of the opposing party – their judicial confreres of the 46th CTC – and to lend their weight in support of the 46th CTC on both substantive and policy grounds. Clearly, Petitioner has been denied due process of law, the most basic requirement of which is a fair hearing before a fairly composed tribunal.

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[10] This is entirely aside from the failure to be "patient, dignified and courteous to litigants, * * * lawyers and others with whom the judge deals in an official capacity", Michigan Code of Judicial Conduct, Canon 3A(3), Pet. Apx. 360a.

As this Court famously held in *In re Murchison, supra*, 349 US at 136, reversing a prior failure by the Michigan Supreme Court to provide a remedy when a lower court judge crossed the constitutional line:

> **A fair trial in a fair tribunal is a basic requirement of due process.** Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.** That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "**Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true** between the State and the accused **denies** the latter **due process of law.**" *Tumey v. State of Ohio*, 273 US 510, 532; 47 S Ct 437, 444; 71 L Ed 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. **But to perform its high function in the best way "justice must satisfy the appearance of justice."** *Offutt v. United States*, 348 US 11, 14; 75 S Ct 11, 13.

Equally, a fair hearing in an appellate tribunal like the Michigan Court of Appeals is a basic requirement of due process under US Const, Amendment 14, and protectable in federal court as a federal right, *Fieger v. Ferry*, 471 F3d 637, 643-644 (2006). Any such fair hearing requires an "absence of actual bias" at both the trial and appellate levels. Allowing an initial, discretionary determination by a trial judge, and review thereof by appellate judges, all of whom

are members of a judicial organization which affirmatively sides with one of the parties, represents something substantially worse than "a possible temptation to the average [person] as a judge not to hold the balance nice, clear and true between" the competing parties. The results of such constitutionally flawed proceedings unquestionably fail to "satisfy the appearance of justice."

Clearly, Judge Kolenda as well as the reviewing judges of the Michigan Court of Appeals were subject to "temptations * * * not to hold the balance nice, straight, and true" between Petitioner and the 46th CTC (and Otsego County, which marched in lockstep with the 46th CTC throughout), and the result is that Petitioner was denied due process of law.

The three judicial associations and their members (from whom they are indistinguishable) completely lost sight of the essential principle that adjudicators must be neutral in fact as well as appearance. Even if the unseemly appearance of injustice were by itself inadequate grounds to find a due process violation under the 14th Amendment, the clear tacit admission of actual bias must surely suffice. When judges other than those directly involved as parties to the litigation, including those fulfilling an adjudicator's role, seek to side with their colleagues as *amici curiae*, clearly all sense of judicial propriety, decorum, fairness, and neutrality has been suborned, to the everlasting shame of Michigan's "one court of justice", Mich. Const 1963, art 6, §1 (Pet. Apx. 357a).

In effect, the Michigan Court of Appeals has revealed that its judges, together with Judge Kolenda, wish to participate in the underlying litigation as advocates for one party. Inasmuch as Petitioner has borne the brunt of Judge Kolenda's *sua sponte* imposition of sanctions, upheld by the Michigan Court of Appeals as within his discretion, all

participating judges in those decisions are now seen to have been permeated with preconceived bias against Petitioner to an extent that is wholly unprecedented. The most fundamental due process principles of the Fourteenth Amendment now require reversal and remand for a hearing *ab initio* before a truly impartial and neutral arbiter, if one can be found.

Petitioner notes that, had the evidence of actual bias been available before the entry of final judgment by Judge Kolenda, it would have had a right to remove the case to the federal district court under 28 U.S.C. §1443(1), by invoking its rights under 28 U.S.C. §1446(b) ("If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable * * * ".) (Pet. Apx. 346a, Appendix S). The delayed revelation of judicial bias ought not operate to deny Petitioner its federal constitutional and statutory right to a fair hearing in a fair tribunal of any claim for sanctions against it.

CONCLUSION

For the foregoing reasons, Cohl, Stoker, Toskey & McGlinchey, P.C. respectfully prays that its petition for certiorari be granted, or alternatively, pursuant to Supreme Court Rule 16.1, that the Court summarily reverse the lower court orders in this cause and direct that any motion or request for sanctions be addressed *ab inito* after the case is assigned to a truly neutral and unbiased judge, either through Mich. Const. 1963, art. 6, §23 (Pet. Apx. 357a, Appendix X), Mich. Comp. L. §600.226 (Pet. Apx. 358a, Appendix Y), or 28 U.S.C. §1443(1) (Pet. Apx. 346a, Appendix S).

Respectfully submitted

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